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No. 97-1625

In the Supreme Court of the United States

OCTOBER TERM, 1997

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly sustained the Federal Trade Commission's determination that petitioner is subject to the Commission's jurisdiction because it is a trade association "organized to carry on business for * * * [the] profit * * * of its members" within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

2. Whether the court of appeals and the Commission conducted a sufficient analysis to determine, under the rule of reason, that petitioner's restrictions on its members' advertising of prices, discounts, and quality claims violated Section 5 of the Act, 15 U.S.C. 45.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 128 F.3d 720. The opinion and order of the Federal Trade Commission (Pet. App. 27a-158a) and the initial decision of the administrative law judge (Pet. App. 159a-265a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October [illegible], 1997. A petition for rehearing was denied on January 28, 1998. Pet. App. 266a. The petition for a writ of certiorari was filed on April 3, 1998. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner California Dental Association is a nonprofit trade association. Pet. App. 8a. Membership is not necessary to obtain a state dental license, but 75% of the State's practicing dentists have joined the association. *Ibid.* Petitioner provides its members with a variety of services, including "lobbying, marketing and public relations, seminars on practice management, assistance in compliance with OSHA and disability requirements, continuing education, placement services, and administrative procedures for handling patient complaints." *Ibid.* For-profit subsidiaries offer members practice-related services such as liability and other insurance plans and financing for the purchase of office equipment. *Id.* at 8a-9a.

To establish and maintain membership in petitioner, a dentist must agree to abide by a Code of Ethics adopted by petitioner's House of Delegates and interpreted and enforced by its Judicial Council. Pet. App. 9a, 46a-47a. Petitioner and its local affiliates monitor dentists' compliance with the Code. Applicants who do not comply may be denied membership in the Association, and members found to have violated the Code may be censured, suspended or expelled. *Id.* at 11a-12a, 47a; see *id.* at 56a n.6, 190a, 193a-198a, 232a-233a.

Section 10 of petitioner's Code prohibits advertising that is "false or misleading in any material respect." Pet. App. 9a. Official advisory opinions have interpreted Section 10 to prohibit any statement that "relates to fees for specific types of services without fully and specifically disclosing all variables and

other relevant factors," and to require that any advertisement using "words of comparison or relativity," such as "low fees," to describe the cost of dental services "must be based on verifiable data substantiating the comparison or statement of relativity." *Id.* at 9a-10a, 64a. Another advisory opinion states that "claims as to the quality of services are not susceptible to measurement or verification," and are therefore "likely to be false or misleading." *Id.* at 10a, 74a-75a. Supplemental "advertising guidelines" further specify that any advertisement of a discount must disclose the nondiscounted fee for the same service; the discounted fee or the percentage discount offered for each "specific service"; the length of time the discount will be offered; "[v]erifiable fees"; and what specific groups qualify for the discount, or any other relevant terms, conditions or restrictions. *Id.* at 11a, 64a-65a.

Petitioner and its affiliates have applied these standards to prohibit dentists from advertising "low," "reasonable," or "affordable" fees, and to preclude across-the-board discount advertisements such as "10% senior citizen discount," "20% off new patients with this ad," and "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94." Pet. App. 65a-67a, 198a-199a; see also *id.* at 77a, 200a-202a. They have further prohibited quality claims such as "quality dentistry," "dedicated to m ntaining the highest quality of endodontic care," "improved results with the latest techniques," and "latest in cosmetic dentistry." *Id.* at 75a, 202a-206a. Petitioner at one time disapproved advertising of "gentle" care, and its local affiliates thereafter continued to proscribe similar advertising. *Id.* at 76a, 211a-212a. Petitioner has also proscribed claims

implying superior quality, such as "state of the art" care, "highest standards in sterilization," or "all of our handpieces (drills) are individually autoclaved for each and every patient"; claims of punctual service; and advertised guarantees, such as "we guarantee all dental work for 1 year" and "crowns and bridges that last." *Id.* at 75a-76a, 204a, 206a-210a.

2. a. Respondent Federal Trade Commission (FTC) issued an administrative complaint charging that petitioner's ethical rules, as interpreted and enforced, had restrained competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. After extensive discovery and a two-week hearing (see Pet. App. 160a), an Administrative Law Judge (ALJ) concluded that petitioner had violated the Act. *Id.* at 159a-265a.

The ALJ concluded that petitioner was a "corporation" subject to the FTC's jurisdiction under Sections 4 and 5 of the Act, 15 U.S.C. 44-45, because "a substantial part of [its] activities result in pecuniary benefits to its members." Pet. App. 253a; see *id.* at 249a-254a. On the merits, the ALJ determined, on the basis of extensive factual findings (see *id.* at 161a-247a), that petitioner's ethics Code, as actually enforced, "unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect," and that by enforcing the Code petitioner had "successfully withheld from the public information about prices, discounts, quality, superiority of service, guarantees, and the use of procedures to allay patient anxiety." *Id.* at 259a-260a (record citations omitted). In rejecting petitioner's proffered pro-competitive justification for its advertising restrictions, the ALJ found that the restrictions arose from and reflected, at least in part, an "aversion

to competition." *Id.* at 191a-193a. The ALJ was not convinced that petitioner enjoyed "market power," but he concluded that petitioner had violated the Act because it had "illegally conspired to prevent members, and potential members, from using truthful, nondeceptive advertising" and the conspiracy had "injured those consumers who rely on advertising to choose dentists." *Id.* at 261a-263a.

b. On plenary review of the ALJ's initial decision (see 16 C.F.R. 3.54(a)-(b)), the Commission agreed that petitioner was subject to its jurisdiction as a corporation "organized to carry on business for its own profit or that of its members" within the meaning of 15 U.S.C. 44. Pet. App. 47a-52a. Noting that it had previously rejected the argument that the term "profit" in this context could properly be limited to "direct gains distributed to * * * members," the Commission held that it had jurisdiction in this case because a substantial portion of petitioner's activities consist of lobbying, practice-management, marketing, public relations, and other business-related services that confer "pecuniary benefits" on its members. *Id.* at 49a, 51a-52a.

On the merits, the Commission first determined that petitioner's restrictions on price advertising, as actually enforced, "effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts," without any real regard for whether any particular advertisement was inaccurate or misleading. Pet. App. 65a-66a. Reasoning that an agreement among competitors to "suppress[] broad categories of truthful and nondeceptive price advertising" would "effectively suspend a significant form of price competition" (*id.* at 69a), the Commission

concluded that petitioner's "effective prohibition on [even] truthful and nondeceptive advertising of low fees and across-the-board discounts constitute[d] a naked attempt to eliminate price competition and must be judged unlawful per se." *Id.* at 67a; see *id.* at 60a-63a, 67a-73a.

In addition to its "per se" discussion, the Commission also undertook a "rule of reason" analysis. That analysis covered not only petitioner's restrictions on price advertising but also its restrictions on non-price advertising, such as the preclusion of "all quality claims" and restrictions on "claims of superiority," the issuance of "guarantees," and the advertising of "gentle" care. Pet. App. 73a-92a; see *id.* at 75a-76a. In addition to general observations concerning the effects of restrictions on truthful price and non-price advertising, the Commission cited "substantial evidence" in this case "that the restrictions imposed by [petitioner] prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists." *Id.* at 76a; see *id.* at 76a-78a. Thus, although it did not "quantify[] the increase in price or reduction in output occasioned by these restraints," the Commission found their "anticompetitive nature" to be "plain." *Id.* at 78a.

The Commission rejected the ALJ's conclusion that petitioner lacked sufficient "market power" for its advertising restrictions to affect California consumers, agreeing instead with his finding that those restrictions had "injured those consumers who rely on advertising to choose dentists." Pet. App. 78a-79a. On the record before it, the Commission had "little doubt" that petitioner had "the ability to police,

and entice its members to adhere to, the restrictions on advertising." *Id.* at 80a. In addition, the Commission concluded that petitioner had "the necessary power to cause harm to consumers" (*ibid.*) by inducing its members to withhold information, because "the services offered by licensed dentists have few close substitutes" (*id.* at 82a); "the market for such services is a local one" (*ibid.*); petitioner's members command "more than a substantial share of these markets" (*ibid.*); and, contrary to the ALJ's understanding, there are "significant barriers to entry" into those markets (*id.* at 82a-84a).

The Commission also rejected petitioner's contention that its restrictions were either harmless or procompetitive. Pet. App. 84a-89a. Although the Commission agreed that the prevention of "false and misleading" advertising is a "laudable purpose," in its view "the record [would] not support the claim that [petitioner's] actions [were] limited to advancing that goal." *Id.* at 84a. It found, rather, that petitioner's "broad categorical prohibitions" (*id.* at 87a) were enforced "without any enquiry as to how [prohibited terms, claims or promises] * * * might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim" (*id.* at 86a), and without "evidence of significant abuse * * * that might provide support for a prophylactic ban" (*id.* at 85a). The Commission perceived "no convincing argument, let alone evidence" in the record to show "that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising [petitioner] restricts," or to support the conclusion that all such advertising is "categorically false, deceptive, or unfair." *Id.* at 89a.

Having found that petitioner's categorical advertising restrictions were likely to have real anticompetitive effects and that they were unsupported by valid efficiency or business justifications, the Commission held that their imposition violated Section 5 of the Act. Pet. App. 90a-91a.[1] The Commission therefore ordered petitioner to cease and desist from imposing such restrictions. *Id.* at 27a-42a. The order expressly provides, however, that petitioner may "adopt[] * * * and enforc[e] reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." *Id.* at 30a. Thus, the Commission explained, petitioner remains "free to regulate false and misleading forms of marketing and advertising by its members," but it may not impose "broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services." *Id.* at 43a.

Commissioner Starek concurred in the Commission's judgment and order and in most of its conclusions. Pet. App. 147a. He would, however, have employed a somewhat different analytical framework from that reflected in the majority opinion. *Id.* at 148a-158a.

Commissioner Azcuenaga dissented. Pet. App. 108a-147a. She specifically concurred in the majority's jurisdictional holding, and she agreed with "much in the majority's opinion," including that a trade association's "categorical and complete ban on price advertising" would be unlawful. *Id.* at 108a. She concluded, however, that the record evidence in this case "f[ell] short of establishing liability." *Ibid.* In particular, she "question[ed]" whether sufficient evidence supported the Commission's finding that petitioner had enforced its rules "in such a way as to limit truthful advertising" (*id.* at 109a, 112a-136a), and she did not believe the evidence was sufficient to support the Commission's finding of market power, which she considered "essential to a finding of liability under the rule of reason" (*id.* at 110a, 136a-147a).

[1] The Commission also rejected petitioner's arguments that petitioner could not or did not enter into any potentially unlawful agreement with its members or local affiliates (Pet. App. 52a-60a) and that its restrictions were permissible because state law imposed similar ones (*id.* at 92a-93a). Petitioner does not renew those claims in this Court.

3. The court of appeals affirmed the Commission's decision and enforced its order. Pet. App. 1a, 8a-24a. The court agreed with the Commission and other courts that Congress "did not intend to provide a blanket exclusion for nonprofit corporations" under the Act, and it approved the Commission's approach of "looking at whether the organization provides tangible, pecuniary benefits to its members" in order to determine whether it is a "corporation" subject to the Commission's jurisdiction. *Id.* at 15a-16a. Under that standard, the court was "confident that the facts of this case support the FTC's jurisdiction." *Ibid.*

On the merits, the court rejected the Commission's holding that petitioner's price-advertising restrictions were per se illegal. Pet. App. 17a-18a. It agreed, however, that those restrictions "amounted in practice to a fairly 'naked' restraint on price competition itself" (*id.* at 18a), and it found "no evidence" in the record to support petitioner's asserted justifications of preventing false advertisements and requiring disclosure of additional facts important to consumers

(*id.* at 19a). The court accordingly concluded that the Commission had properly held petitioner's price-advertising restrictions to be unlawful without engaging in an "elaborate industry analysis." *Id.* at 18a-19a. Similarly, the court held (*id.* at 19a-20a) that petitioner's restrictions on non-price advertising, which "prevent[ed] dentists from fully describing the package of services they offer, and thus limit[ed] their ability to compete," constituted a "naked restraint on output." The Commission's analysis was therefore adequate to hold the restrictions unlawful, given "the nature of the restraint and the circumstances in which it [was] used." *Id.* at 20a; see *id.* at 24a.

The court rejected petitioner's contention that the record was insufficient to support the Commission's rule-of-reason analysis. Pet. App. 20a-24a. In particular, the court held that there was substantial evidence to support the Commission's conclusion that petitioner's restrictions were applied, in practice, to restrict advertising that was "in fact true and nondeceptive" (*id.* at 21a-22a), or "without any particular consideration of whether it was true or false" (*id.* at 23a). The court also held that the Commission had adequately addressed the issue of market power, holding that "[g]iven the facially anticompetitive nature of both the price and nonprice advertising restrictions, the evidence of [petitioner's] large market share and influence justifie[d] finding a violation" without more detailed analysis. *Id.* at 24a. The court accordingly affirmed the Commission's opinion and enforced its order to cease and desist from restricting "truthful and non-deceptive advertisements." *Ibid.*

Judge Real dissented. Pet. App. 25a-26a. In his view, petitioner had "nothing to do with competition in the dental profession," and was therefore not

subject to the Commission's jurisdiction. *Id.* at 25a. Even on the assumption that the Commission had jurisdiction, he would have held that petitioner did not intend to restrain competition, and that its advertising restrictions could not properly be held unlawful without more searching economic analysis.

ARGUMENT

1. Petitioner argues (Pet. 9-16) that as a "nonprofit" trade association it is not a "corporation" subject to the FTC's jurisdiction under Sections 4 and 5 of the Federal Trade Commission Act, 15 U.S.C. 44-45. That is not correct.

The definition of "corporation" in Section 4 includes both entities with and those without "shares of capital or capital stock," and it expressly applies to any non-stock "association," other than a partnership, that is "organized to carry on business" for the "profit" of its "members." 15 U.S.C. 44. That language suggests that Congress intended the definition to reach non-stock associations, such as petitioner, that are composed of members engaged in commerce who have joined together in significant part to advance their commercial or professional economic interests. Such a construction is supported by a common-sense understanding of the purposes of the Act, which surely extend to regulating the activities of commercial associations, even if the direct economic benefits of those activities are realized derivatively by association members through an increase in their own business or profits. And it is confirmed by the Act's legislative history, which shows that the definition of "corporation" was expanded to include an association without capital stock organized for the profit "of its members" after the Commissioner of the

Bureau of Corporations, predecessor to the FTC, complained to the author of the Senate bill that the original language could prevent the proposed Commission from regulating trade associations organized as nonprofit corporations. See *Community Blood Bank of the Kansas City Area, Inc.* v. *FTC*, 405 F.2d 1011, 1017-1018 (8th Cir. 1969).[2]

The court of appeals in this case therefore properly agreed with the Commission, and with every court of appeals that has considered the matter, that the Act does not "provide a blanket exclusion for nonprofit corporations." Pet. App. 16a; see *id.* at 48a-49a; *American Medical Ass'n* v. *FTC*, 638 F.2d 443, 448 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982)[3]; *FTC* v. *National Comm'n on Egg Nutrition*, 517 F.2d 485, 487-488 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976); *Community Blood Bank*, 405 F.2d

[2] Petitioner's reliance (Pet. 14-15) on the failure of a 1977 proposal to amend the Act—always "a particularly dangerous ground on which to rest an interpretation of a prior statute," *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994)—is particularly unavailing here, because the proposed amendment would not simply have codified the Commission's interpretation of the present statutory language. It would, instead, have eliminated any distinction between regular business corporations and nonprofit entities of any kind, including those organized for purely charitable purposes. See also, *e.g.*, *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966) (rejecting a similar argument based on congressional inaction).

[3] We note that *American Medical Association* presented before this Court not only the jurisdictional question, but also a question concerning the propriety of the Commission's entry of a prospective cease-and-desist order in light of ethical-rule changes adopted by the AMA after the filing of the administrative complaint. See 80-1690 Gov't Br. I, 46-59.

at 1017; see also *National Harness Mfrs. Ass'n* v. *FTC*, 268 F. 705, 708-709, 712 (6th Cir. 1920) (unincorporated trade association). The court further sustained the Commission's approach of distinguishing between truly charitable entities and those that are subject to its jurisdiction under Sections 4 and 5 by determining whether a substantial portion of the organization's activities are ones that confer pecuniary benefits on members that are themselves commercial or professional enterprises. Pet. App. 16a, 48a-50a; compare *In re College Football Ass'n*, 117 F.T.C. 971 (1994) (finding no jurisdiction over an entity whose own activities bore a substantial nexus to a charitable purpose and whose proceeds were distributed exclusively to members that were themselves nonprofit entities). Applying that standard, the court of appeals found itself "confident that the facts of this case support the FTC's jurisdiction." Pet. App. 16a.[4]

That result does not, as petitioner argues (Pet. 9-13, 16), conflict with the decision in *Community Blood Bank*. Although the Eighth Circuit in that case rejected the broad argument that the Commission could reach any organization that receives "fees,

[4] Petitioner does not dispute the Commission's factual determination, sustained by the court of appeals, that a substantial portion of petitioner's activities are devoted to furthering its members' business interests through, for example, lobbying, litigation, public relations, and numerous forms of assistance with the business aspects of their dental practices. See Pet. App. 8a, 51a-52a. Indeed, by one of petitioner's own accountings, 65% of petitioner's resources funded "[d]irect [m]ember [s]ervices," while only 7% were devoted to "[s]ervices to the [p]ublic." *Id.* at 52a. In 1985, petitioner estimated that its marketing program had resulted in "nearly $6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment." *Id.* at 180a.

prices, or dues" and is not "prohibited by its charter from devoting any excess of income over expenditures * * * for its own self-perpetuation or expansion," 405 F.2d at 1016 (internal quotation marks and emphasis omitted), it explicitly recognized that

> Congress did not intend to provide a blanket exclusion of all nonprofit corporations for it was also aware that corporations, ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members.

Id. at 1017. It therefore concluded that jurisdiction under the Act must be "determined on an ad hoc basis" by evaluating, not the form of an association's incorporation, but whether it was "in law and in fact [a] charitable organization[]." *Id.* at 1018-1019.

In holding that the blood bank and hospital association parties before it were "true nonprofit charitable corporations" (405 F.2d at 1018) for purposes of Section 4, the Eighth Circuit focused on their purposes, activities, and affiliation with other non-profit organizations. *Id.* at 1013-1014, 1020 & n.16, 1021-1022. Moreover, the court explicitly distinguished those entities from trade or business associations "designed to * * * bring together firms having common business concerns," which it characterized as "engaged in business for a pecuniary profit" on behalf of themselves or their members. *Id.* at 1019; see *id.* at 1017; cf. *FTC* v. *Freeman Hospital*, 69 F.3d 260, 266 (8th Cir. 1995) (quoting as *Community Blood Bank*'s holding its statement that the Act excludes from jurisdiction "nonprofit corporations * * * organized for and actually engaged in business for *only charitable purposes*" (emphasis added)). That distinction is

consistent with the decisions below in this case, and with the long line of cases, before and after *Community Blood Bank*, in which this Court and others have entertained cases brought under the Act against trade or professional associations.[5] While the question whether a particular organization is "truly charitable" (Pet. App. 16a) for these purposes, or otherwise does not qualify as a corporation within the meaning of Section 4, may sometimes be a close one, that is true of many such factual determinations, and in any event the question is not close here. The matter accordingly does not warrant review in this case.

2. Petitioner contends (Pet. 16-29) that the court of appeals erred by applying an "abbreviated rule of reason" analysis in a manner that conflicts with decisions of this Court and other courts of appeals. To

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[5] See, *e.g.*, Pet. App. 16a ("we agree with the Eighth Circuit that truly charitable organizations should be exempt from the FTC's reach"), 48a ("the test we apply was first articulated in *Community Blood Bank*"); *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457 (1941); *National Comm'n on Egg Nutrition*, 517 F.2d at 488; *National Harness Mfrs. Ass'n* v. *FTC*, 268 F. at 708-709. By contrast, courts of appeals have expressly addressed the jurisdictional issue petitioner seeks to raise in only a handful of decisions since the Act was passed in 1914. See Pet. App. 14a-16a; *American Medical Ass'n*, *supra*; *National Comm'n on Egg Nutrition*, *supra*; *Community Blood Bank*, *supra*; see also *National Harness Mfrs. Ass'n*, *supra* (unincorporated trade association); cf. *FTC* v. *Ernstthal*, 607 F.2d 488, 491 (D.C. Cir. 1979) (issue of FTC's jurisdiction is a factual one not suitable for resolution in subpoena enforcement proceeding).

the contrary, the court enforced the Commission's order in this case because it concluded that the Commission's detailed factfinding provided substantial support for a legal analysis that was adequate under the circumstances of the case. See Pet. App. 18a, 20a-24a. That context-sensitive approach to antitrust analysis is fully consistent with applicable law.

We note, at the outset, that much of petitioner's argument rests on the premise that its advertising restrictions have been "found to have no anticompetitive effects." Pet. 16; see also, *e.g.*, Pet. i. That premise is incorrect. Many of the "findings" by the ALJ that petitioner quotes or cites are merely summaries of the testimony given by petitioner's expert. Compare Pet. 2, 6-7 with Pet. App. 245a-246a. Moreover, while the ALJ concluded that petitioner did not have "market power" (Pet. App. 262a), he also declared it "well-documented" that petitioner had engaged in an illegal conspiracy that "injured those consumers who rely on advertising to choose dentists" (*id.* at 261a). In any event, whatever the ALJ's findings, the Act invests only the Commission itself with the authority to find facts or reach legal conclusions, and the Commission's review of the ALJ's initial decision was plenary as to both facts and law. See 15 U.S.C. 45(b); 16 C.F.R. 3.54(a)-(b). The Commission adopted the ALJ's factual findings only to the extent consistent with its opinion; it explicitly accepted his conclusion regarding consumer injury, and explicitly rejected his conclusion concerning "market power." Pet. App. 45a, 78a-79a. It is those findings that the Act renders "conclusive" so long as they are "supported by evidence" (15 U.S.C. 45(c))—as the court of appeals held they are in this case (Pet. App. 20a-24a).

Petitioner concedes that, under any analytical framework, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." Pet. 18, quoting *NCAA* v. *Board of Regents*, 468 U.S. 85, 103 (1984). Under the circumstances of this case, including the Commission's findings concerning actual and potential consumer injury, the court of appeals correctly concluded that it could sustain the Commission's determination of illegality. Pet. App. 18a-20a.

As the court of appeals recognized, the Commission acted in this case on the basis of an extensive factual record. See Pet. App. 20a-24a. From that record, the Commission found that petitioner's interpretation and enforcement of its ethical canon prohibiting "false or misleading" advertising had had the actual effect of prohibiting a broad range of truthful, nondeceptive advertising. *Id.* at 64a-67a, 74a-78a. It noted that such restrictions would naturally tend to impede competition by "increas[ing] the difficulty of discovering the lowest cost seller of acceptable ability," reducing "the incentive to price competitively," and "perpetuat[ing] the market position of established [market participants]." *Id.* at 59a, quoting *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 377-378 (1977)).[6] And on the particular facts of record, it found that advertising containing price or quality information is important to consumers in selecting a dentist (Pet.

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[6] See also *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996) ("common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market" (footnote omitted)).

App. 76a-78a, 231a), and that such advertisements are an important tool for competition among dentists.[7] The Commission thus concluded that petitioner's advertising restrictions in fact "deprive[d] consumers of information they value and of healthy competition for their patronage," and were likely to reduce the output of dental services. *Id.* at 78a.[8] The Commission further considered petitioner's proffered pro-

[7] For example, an ad offering "gentle dentistry in a caring environment" had attracted 300 new patients in six months, before it was discontinued at petitioner's insistence. See Pet. App. 77a. Other evidence showed that advertising that offered a discount for new customers was markedly more effective than advertising that did not. *Ibid.* The Commission cited one instance in which a dentist who engaged in price and quality advertising saw his number of new patients increase, only to decline when petitioner forced him to delete those features from his advertisements. *Id.* at 77a-78a.

[8] This Court has observed that proof of actual detrimental effects on competition can obviate any need for inquiry into surrogate indicators such as market definition and market power. *Indiana Fed'n of Dentists*, 476 U.S. at 460-461. The Commission nonetheless considered the issue of market power (see Pet. App. 78a-84a), observing that the market for dental services is localized (*id.* at 82a), that petitioner's members accounted for at least 75% of dentists statewide and up to 90% in some localities (*ibid.*), and that petitioner had the ability to enforce compliance with its restrictions (*id.* at 77a n.18, 80a-84a). The evidence supporting a finding of market power in this case is comparable to that accepted by this Court and other courts of appeals in cases involving trade restraints imposed by professional associations. See, *e.g.*, *Indiana Fed'n of Dentists*, 476 U.S. at 460; *Wilk* v. *AMA*, 895 F.2d 352, 360 (7th Cir.), cert. denied, 496 U.S. 927 (1990); cf. *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 351-352, 354 n.29 (1982); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), cert. denied, 484 U.S. 977 (1987); 7 P. Areeda, *Antitrust Law* ¶ 1503, at 377 (1986).

competitive justifications for its restrictions, but found them insufficient to justify petitioner's sweeping restraints on truthful and nondeceptive advertising. *Id.* at 84a-89a.

In reviewing the Commission's decision, the court of appeals noted this Court's "repeated holdings that the scope of inquiry under the rule of reason is intended to be flexible depending on the nature of the restraint and the circumstances in which it is used." Pet. App. 20a, citing *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986), and *National Soc'y of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 692 (1978); see also *Indiana Fed'n of Dentists*, 476 U.S. at 460 (even in the absence of "naked" restraint, no "detailed market analysis" is required where there is other evidence of "genuine adverse effects on competition)"; *NCAA*, 468 U.S. at 109-110 & nn. 39, 42 (no "elaborate industry analysis" is required to demonstrate the illegality of a "naked restriction on price or output"). The court agreed with the Commission that the advertising restrictions actually enforced by petitioner amounted to "fairly 'naked' restraint[s]" on price competition and output (Pet. App. 18a), and were "in effect a form of output limitation" because they "restrict[ed] the supply of information about individual dentists' services" (*id.* at 19a-20a, citing P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1505, at 693-694 (Supp. 1997)). Under those circumstances, the court concluded that the Commission's factfinding and analysis were sufficient to demonstrate the restrictions' illegality under the rule of reason. *Id.* at 20a-24a.

Petitioner's contention to the contrary (Pet. 19-22) notwithstanding, nothing in this Court's decisions precludes the court of appeals' use of a flexible and

practical rule-of-reason analysis in this case. See also Klein, *A 'Stepwise' Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, 12 Antitrust No. 2, at 41, 44 & n.10 (Spring 1998) (advocating a similar practical approach and citing the decision below with approval). Indeed, this case closely resembles *Indiana Federation of Dentists*, in which an association of dentists agreed not to send x-rays to patients' health insurers, which wanted the x-rays to determine whether proposed treatments were necessary. 476 U.S. at 449-450. The Court in that case concluded that, even if the restraint at issue was not as "naked" as that involved in *NCAA*, the FTC's findings that "in two localities * * * Federation dentists constituted heavy majorities of the practicing dentists and * * * as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays" were "legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." *Id.* at 460-461. The Court observed that such a "concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified [was] likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it [could] be condemned even absent proof that it resulted in higher prices or * * * the purchase of higher-priced services." *Id.* at 461-462. Compare Pet. App. 76a-78a, 79a-82a & n.20.[9]

[9] Other courts of appeals have also held that, where it is otherwise appropriate to the circumstances, an abbreviated rule-of-reason analysis need not be premised on a showing that an agreement on its face raises price or reduces output. See, *e.g.*, *Law* v. *NCAA*, 134 F.3d 1010, 1019, 1020 (10th Cir. 1998); *Lie* v. *St. Joseph Hospital*, 964 F.2d 567, 569-570 (6th Cir. 1992); *Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir.), cert. denied, 506 U.S. 954 (1992).

Nor does the court of appeals' reliance on an "abbreviated" analysis conflict with *United States* v. *Brown University*, 5 F.3d 658 (3d Cir. 1993), *Illinois Corporate Travel, Inc.* v. *American Airlines*, 806 F.2d 722 (7th Cir. 1986), or *Vogel* v. *American Society of Appraisers*, 744 F.2d 598 (7th Cir. 1984). See Pet. 19-29. *Brown* recognized that abbreviated analysis is appropriate in some cases (5 F.3d at 669), but it concluded, after extended consideration (*id.* at 673-678), that the pro-competitive justifications offered in that case were sufficiently compelling to require a more searching analysis. In this case, by contrast, both the Commission and the court of appeals found it possible to dispose of petitioner's proffered justifications relatively briefly. Pet. App. 19a, 84a-89a. That difference in circumstances does not amount to a conflict between the decisions.

In *Illinois Travel*, the court of appeals declined to use an abbreviated analysis to evaluate whether a private antitrust plaintiff was entitled to a preliminary injunction prohibiting an airline from imposing advertising restraints in the context of a vertical agency relationship. That decision has little relevance to this case, which arises in the very different context of horizontal restraints among competitors. See, *e.g.*, *Business Electronics Corp.* v. *Sharp Elec-*

tronics Corp., 485 U.S. 717, 726-727 (1988).[10] *Vogel*, which was also an interlocutory appeal in a private action, concluded only that there was "insufficient basis in the present record" for holding the restraint at issue—an ethical rule that prohibited appraisers from charging fees measured by a percentage of the value they attributed to the item appraised—to be a form of price fixing that must be condemned as illegal per se. 744 F.2d at 600, 603-604.

The court of appeals in this case reviewed and sustained, under a practical rule-of-reason analysis suited to the record before it, the Commission's factual and legal determination that petitioner's enforcement of broad categorical restrictions on its members' price and other advertising amounted to an unreasonable restraint of trade, and therefore violated Section 5 of the Act. The Commission's order requires only that petitioner, in the future, confine its ethical prohibitions to advertisements that it reasonably believes to be "false or deceptive" within the meaning of Section 5. In the absence of any conflict with a decision of this Court or another court of appeals, nothing in the decisions or order below warrants review by this Court.

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[10] *American Ad Management, Inc.* v. *GTE Corp.*, 92 F.3d 781 (9th Cir. 1996), which followed *Illinois Corporate Travel*, also involved a vertical relationship with an agent. See *id.* at 785-786, 789-790. In any event, any conflict with that decision would be for the Ninth Circuit itself to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam); see also Pet. App. 18a (distinguishing *American Ad Management*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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